IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1193 OF 2003

1. Shri Ashok Mahadu Devare,)
R/o.Sonali Building,)
Patharrli Naka,)
Dombivali (East),)

2. Shri Dilip Ashok Devare,)
R/o.Sonali Building,)
patharrli Naka,)
Dombivali (East),)

3. Shri Shyam Jairam Choudhary,)
R/at & P - Thakurli,)
Chola Gaon, Thakurli,)

4. Shri Chandu Nagnath Gaikwad,)
R/o.-Patharli Naka,)
Dombivali (East),)..Petitioners.

Vs.

The State of Maharashtra.)..Respondent

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Shri S.P.Kadam and Shri A.P.Patil for the Petitioners.

Shri B.H.Mehta, APP for the State.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 10th February, 2005.

JUDGMENT:

1. Heard. Rule. By consent, the rule is made

returnable forthwith.

2. The petitioners challenge the order passed by the Additional Sessions Judge, Kalyan, directing the Ld.Magistrate to record evidence of the complainant, even though the statement of the accused under Section 313 of Criminal Procedure Code, 1973, was already recorded.

3. The petitioners are the accused in the Criminal Case No.164 of 1995 being prosecuted under Section 325 read with 506 of the Indian Penal Code. The charges in the case were framed on 30th September, 1998. The first prosecution witness was examined on 6th January, 1999 followed by three other witnesses, the last such witness having been examined by 26th April, 2000 and thereafter, the matter was adjourned from time to time to enable the other witnesses including the complainant to be examined. However, the prosecution failed to secure the presence of the complainant in the Court for his examination. On 6th September, 2000, the Ld.Magistrate by his order, while observing that sufficient opportunity was given to the prosecution to produce the evidence of the complainant, directed the prosecution to keep the complainant present. Summons was issued time and

again to the complainant and under the report dated 3rd October, 2000, the police informed the Ld.Magistrate about the service of the summons upon the complainant. The complainant however failed to appear in the Court, inspite of repeated summons issued to him. It is the contention of the petitioners that the last such summons issued to him, was refused to be accepted by the complainant and the said fact was narrated by the prosecution itself in its application Exhibit-46 and therefore non-bailable warrant was prayed for. The said application was rejected by the Learned Magistrate under Order dated 8th November, 2000. The said order was not challenged by the prosecution and the matter proceeded for recording of statement under Section 313 of the Code of Criminal Procedure, 1973. On 15th March, 2001, the matter was posted for argument on which day, without any summons, the complainant appeared before the Learned Magistrate and the prosecution applied leave to examine the complainant present in the Court which was rejected by the Learned Magistrate. Being aggrieved, the prosecution filed Revision Application before the Sessions Court, Kalyan, being Criminal Revision Application No.25 of 2001 and the Additional Sessions Judge by order dated 22nd June, 2003 allowed the said application, while setting aside the order of

the Ld.Magistrate and directed the Ld.Magistrate to examine the complainant. Hence, the present Petition.

4. The impugned order is sought to be challenged on various grounds. Firstly, it is the contention of the learned Advocate for the petitioners that once the defence of the petitioners is placed on record in the form of recording of 313 statements, it is not open for the criminal Court to allow the prosecution to examine any witness as it would defeat the very purpose and the object behind the provisions of law comprised under Section 313 of the Code of Criminal Procedure, and therefore, the stage at which the powers under Section 311 of the Code of Criminal Procedure can be exercised has necessarily to be prior to the recording of 313 statement. Secondly, the prosecution had not disclosed any cause for non-examination of the complainant prior to the recording of 313 statement and for the delay in examination of the complainant, and therefore, there was neither any reason nor justification for exercise of the powers under Section 311 of the Code of Criminal Procedure. Thirdly, it is the contention of the learned Advocate for the petitioners that the Learned Magistrate by his order dated 8th November, 2000 having once rejected the plea for issuance of

warrant against the complainant for his examination and the said order having attained finality, in the absence of being challenged at any point of time, the prosecution could not be allowed to examine the complainant. Reliance is sought to be placed in the decision in the matter of **Rajendra Prasad v. Narcotic Cell, through its Officer in Charge, Delhi,** reported in (1999) 6 SCC 110, and of the learned Single Judge of this Court in **State of Maharashtra v. Anand Namdeo Patil & Ors.,** reported in 2000(5) Bom.C.R. 503.

5. The Learned APP, on the other hand, has submitted that in the case in hand, the main point to be considered is whether there was any opportunity of a fair trial to the prosecution and the defence, and while considering the same, in the facts and circumstances of the case, the prosecution cannot be accused of being either lethargic or having failed in its duties. Besides, the complainant himself appeared in the Court before disposal of the case and he being the most important witness in the matter, nothing can prevent the criminal Court to allow examination of such witness. Once such witness is examined, obviously, the defence would get an opportunity to cross examine the said witness. Mere recording of 313 statement cannot be a justification to deny fair trial

for the prosecution to examine the complainant and the accused will have further opportunity to give his say in the matter as on examination of the complainant, further statement under Section 313 will have to be recorded in respect of the evidence brought on record through the complainant. Merely because earlier order refusing the warrant was not challenged that by itself cannot be construed to mean that the prosecution is forbidden from examining the complainant even if the complainant himself appears before the Court. According to the learned APP, the order dated 8th November, 2000 is in relation to the entitlement of the prosecution for issuance of warrant against the witness and not on the point as to whether the prosecution is entitled to examine the complainant, who has himself appeared before the Court, and therefore, the said order cannot come in the way of exercising the powers under Section 311 of the Code of Criminal Procedure. According to the learned APP, no prejudice would be caused to the petitioners/accused if the complainant is examined as the opportunity will be available to the petitioners-accused to cross examine the complainant, and in that regard, reliance is sought to be placed in the decision of the Apex Court in the matter of **Zahira Habibulla H.Sheikh & Anr. v. State of Gujarat & Ors.,** reported in 2004

AIR SCW 2325, while drawing attention to the observations by the Apex Court that it is not correct to say that it is only the accused who must be fairly dealt with and the concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecution agencies.

6. The fact that the summons issued against the complainant having proved futile, an application filed for issuance of warrant against the complainant was rejected by the order dated 8th November, 2000 is not in dispute. It is also not in dispute that by the impugned order, after recording of 313 statement of the petitioners-accused, the prosecution has been allowed to examine the complainant.

7. Section 311 of the Code of Criminal Procedure deals with the power of the Court to summon material witness, or to examine person present in the Court. It provides "any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and

re-examine any such person if his evidence appears to it to be essential to the just decision of the case." Plain reading of the section would reveal that it consists of two parts. The first part deals with the discretionary power of the Court to summon, at any stage of proceeding, any person as a witness or to examine any person in attendance, though not summoned as a witness as well as to recall and re-examine such persons those who were already examined. The second part mandates the Court to issue and summon and examine as well as recall and re-examine any such person whose evidence appears to be essential for the just decision in the case. As regards the first part, there is no such mandate which is contemplated under the second part. The discretion under the first part is very wide. However, and undoubtedly, it has to be judiciously exercised. There can be numerous instances where examination as well as recall of a witness may be necessary. Once a case is made out disclosing justification for such summons, or recall of the witness, certainly it would be a judicious exercise of the powers of the Court under the said provisions of law.

8. It is pertinent to note that the expression used in Section 311 is "at any stage of any inquiry,

trial or other proceeding". It is to be noted that the trial does not come to an end unless the provision regarding oral arguments and/or memorandum of arguments in terms of Section 314 and if desired by the accused, the provision regarding entitlement of the accused being examined, he being competent witness in terms of Section 315 of the Code of Criminal Procedure, are complied with. In other words, till and until, the stage of final argument is over, after recording the evidence of the prosecution as well as of the defence, the trial of a criminal case does not come to an end. It is also to be noted that, in terms of Section 310, a Judge is empowered to visit or inspect any place in which an offence is alleged to have been committed, or any other place which according to his opinion necessary to view or inspect for the purpose of properly appreciating the evidence given at such inquiry or trial. Obviously, inspection can be held even after recording of entire evidence is over. The phraseology used in Section 311 is in relation to the stage at which the power to summon material witness or person present can be exercised, is same as that of Section 310 in relation to the stage at which inspection can be held.

9. It is to be noted that Section 311 of the Code

of Criminal Procedure is essentially a provision in relation to the procedure pertaining to the criminal trial. The procedure relating to trial before the Court, whether it is criminal or civil, is essentially to help the Court to arrive at the just decision in the matter, after hearing the parties and it is also to enable the parties to assist the Court to arrive at the correct decision. Being so, any provision regarding procedure pertaining to trial or evidence, cannot be construed in such a manner that would defeat the very purpose behind the statutory provision relating to the procedure. On the contrary, the interpretation, if required, has to be done bearing in mind the very object and the purpose behind such provision. Once the provision comprised under Section 311 is understood to be to enable the Court to help itself to appreciate the evidence in order to arrive at an appropriate decision and to enable the parties to assist the Court in arriving at a just and proper decision, certainly no fetters can be imposed on such power of the Court which would virtually defeat the power given to the Court under the said provision. In fact, the Apex Court in **Mohanlal Shamji Soni v. Union of India & Anr.,** reported in 1991(1) Crimes 818= 1991 Suppl(1) SCC 271, while dealing with the powers of the Court under Section 311, after taking note of various

relevant decisions including in the matters of **Rameshwar Dayal v. State of U.P.,** reported in 1978(2) SCC 518, **State of West Bengal v. Tulsidas Mundhra,** reported in 1963(2) SCJ 204, **Masalti v. State of U.P.**, reported in AIR 1965 SC 202, **Rajeswar Prosad Misra v. State of West Bengal & Anr.,** reported in 1966(1) SCR 178, and **R.B.Mithani v. State of Maharashtra,** reported in AIR 1971 SC 1630, held that :-

> "The principle of law that emerges from the views expressed by this court in the above decisions is that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fairplay and good sense appear to be the only safe guides and that only the requirements of justice commond the examination of any person which would depend on the facts and circumstances of each case."

10. Bearing in mind the law laid down by the Apex Court and considering the facts of the case in hand,

which apparently disclose that the prosecution had made all its efforts to secure the presence of the complainant before the Court much prior to recording of 313 statement of the Code of Criminal Procedure and it had even prayed for issuance of warrant against such witness. However, the learned Magistrate itself had rejected the same only on the ground that the witness did not appear to be interested in the matter. In other words, it was not because of irrelevancy of the testimony of the witness that the Learned Magistrate refused to issue warrant but on the assumption that the complainant was not interested in prosecuting the matter. Apparently, the order was in improper exercise of jurisdiction by the Ld. Magistrate. Undoubtedly, the prosecution could have challenged the same but failure on the part of the prosecution cannot be allowed to use as bonanza to the accused. The Apex Court in **Zahira Habibulla H.** Sheikh's case (supra), has clearly observed that :-

> "Section 311 of the Code and S. 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice

> in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at."

It has been further warned that "the Courts cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency." It has further held that "the power of the Court under Section 165 of the Evidence Act is in a way complementary to is power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court." It has also been ruled that "the second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case- ‘essential’, to an active and alert mind and not to one which is bent to abandon or abdicate." Considering the law laid down by

the Apex Court therefore in a case where the Court finds examination of the person necessary, he being the complainant in the case, certainly such an order cannot be said to have been passed in improper exercise of jurisdiction. The complainant cannot be an irrelevant witness. His testimony is also necessary to establish the F.I.R., and to ascertain the truth about the allegations therein and being so, the examination of the complainant is absolutely necessary. The application for issuance of warrant was in fact improperly rejected by the learned Magistrate. In the circumstances, direction issued by the Sessions Court, Kalyan, for examination of the complainant, who had infact appeared himself, cannot be found fault with. Indeed, examination of the complainant is necessary.

11. The decisions sought to be relied upon by the learned Advocate for the petitioners are of no relevancy in the matter. The Apex Court in **Rajendra Prasad's case (supra)** was dealing with the matter wherein, obviously the examination was sought for to fill the lacuna in the prosecution case. The two witnesses who were already examined, were sought to be re-examined to fill the lacuna in the prosecution case. Certainly, such an attempt was deprecated by

the Apex Court. Similar is the case in **Anand Namdeo Patil (supra)** before the Learned Single Judge of this court. Therein, the person who was not cross-examined earlier, was sought to be recalled without disclosing the justification therefor, and in that regard, therefore, it was held that the Court was justified in rejecting such application. Obviously, both the decisions were delivered in the peculiar set of facts totally different from the case in hand. Being so, they are of no help to the petitioners.

12. For the reasons stated above, there is no substance in the grievance of the petitioners and the impugned order does not suffer from any irregularity or illegality. Hence, the petition fails and is hereby dismissed. Rule is discharged with no order as to costs.